

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE
CRIMINAL APPEAL NO.650 OF 2001

Pandurang Nana Patil,)
Age 38 years, residing at Asgaon,)
Taluka - Panhala,)
District - Kolhapur,)
At present in Central Jail,)
Kolhapur.).. Appellant
(Org.Accused No.1)

Versus

State of Maharashtra.).. Respondent

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Shri Uday Warunjikar for the appellant.
Smt.V.R.Bhonsale, APP for the Respondent-State.

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CORAM : N.V.DABHOLKAR &
SMT.V.K.TAHILRAMANI, JJ

DATED : 21ST FEBRUARY, 2006

ORAL JUDGMENT : (PER N.V.DABHOLKAR, J)

1. The Sessions Case No.204 of 2000 was concluded by the IIIrd Additional Sessions Judge, Kolhapur, vide judgment and order dated 13th August, 2001. The present appellant, who was accused No.1 in the matter, is held guilty of offence punishable under Section 302 of Indian Penal Code. He is sentenced to suffer life imprisonment, a fine of

Rs.200/-, in default, to suffer rigorous imprisonment for one month. Feeling aggrieved by the said finding of guilty, conviction and sentence, the appellant has approached this Court by way of present appeal under Section 374(2) of the Code of Criminal Procedure, 1973.

. In fact, as many as three accused were subjected to trial. Balu Nana Patil and Vijaymala Pandurang Patil were accused Nos.2 and 3. Accused No.2 is brother and accused No.3 is wife of the present appellant. Together they were charged for the offences punishable under Sections 302, 324, 323, 504 read with Section 34 of Indian Penal Code. The accused Nos.2 and 3 are fully acquitted and the present appellant is also acquitted of all other charges, except one under Section 302 of Indian Penal Code. Since the State has not preferred appeal to the extent of acquittal recorded by the trial Court, we are not concerned with that part of the prosecution story. But the same may be described within the judgment, only for the sake of continuity of narration.

2. According to the prosecution story, the incident in question took place on 9th September, 2000 at about 5.30 p.m. The criminal law is set into

motion by PW4 Vimal, who is daughter of the deceased Baburao Daulu Kurne. Vimal (PW 4) and her daughter Gayatri Ananda Patil (PW 7) are staying with the parents of Vimal viz. Victim Baburao and his wife Draupadi, since last 13 years. In fact, Vimal was married about 15 years ago, but since her husband started claiming property of her father, she is staying separately from her husband and with the parents, for last 13 years. The place of husband is within the same town and the same locality, at a distance of few feet from the residence of victim. Inspite of having separated from the husband, Vimal has not filed any proceedings either for maintenance or any complaint against the husband. Vimal, although, admits that the husband has performed second marriage and has also got children from the second wedlock, she has not initiated any prosecution for bigamy as well.

. On the day of incident, which was Saturday, at about 4.30 p.m. or 4.45 p.m., all family members of the victim were at home. The accused are their neighbours. The complainant Vimal was busy in fetching water from the bore well, at a distance of about 250 ft. towards East from the residence. For that purpose, she was required to cross the house of the accused persons. While she was approaching home

with the water containers for the third trip, she heard abuses from accused No.3. Accused No.3 was saying "Chadge Chomadepana Kartes". By the time the complainant rested the water containers in the house, the accused no.3 had followed her to the entrance door of the house of the complainant. Vimal reached the entrance of the house when Vijaymala caught her hair and caused her fall down. Accused No.3 assaulted the complainant. She bit her right thumb. As Vimal raised a cry, her parents, i.e. victim Baburao and mother Draupadibai, tried to intervene in order to rescue her. Accused No.1, who was present by the side of the road, in fact, communicated a threat by saying that he was waiting to kill father of the complainant since last six months. Accused No.1 went inside his house and came out with a stick. He gave 2-3 stick blows on the head of the victim Baburao. Baburao collapsed. In the scuffle, Baburao also lost his denture (artificial) which fell on the spot. Accused No.2 is alleged to have been armed with a sickle and having dealt a blow on right hand of Draupadibai.

. At the cost of repetition, we may point out that the prosecution has not examined Draupadibai. Otherwise also, details regarding injuries caused to Vimal and Draupadibai for which the accused were

charged for the offences punishable under Sections 323 and 324 read with 34 of Indian Penal Code, are not required to be considered, in view of absence of appeal against acquittal by the State.

. The villagers had gathered around the scuffling parties. One Narayan Patil was amongst them. He tried to feed water to the victim, which he did not gulp. Narayan Patil checked pulse of Baburao and left without saying anything to his family members. Vimal called her daughter and tried to make arrangement for taking her father to hospital but no vehicle was available. After some time, the police arrived on the scene. They recorded complaint of Vimal, which was treated as F.I.R. (Exhibit-33). It appears that the police simultaneously recorded an occurrence report (Exhibit- 32), for the sake of record of the police station.

. It is the claim of PW 6 Narayan Patil that in fact, he had been to call the doctor, but the doctor asked him to bring patient to the hospital and when he returned to the village, Baburao had already expired.

. API Vithal Patil (PW 12) has carried out investigation in the present matter. He had received

telephonic intimation from Kale Outpost and after making an entry about intimation in the Station Diary, he had proceeded to the location.

. After completion of investigation, usual procedure of filing charge sheet and committal to the Sessions Court were followed, before the parties entered the trial, which, ultimately, ended in conviction.

3. Apart from the complainant Vimal (PW 4), her daughter Gayatri (PW 7) is the only witness rendering direct account of the alleged incident. The prosecution had examined PW 5 Balwant Tukaram Patil, as an eye witness. Balwant, did not support the prosecution, and was required to be declared hostile and even his cross-examination by the learned APP did not yield desired results for the prosecution. As already referred during the narration of story, PW 6 Narayan Pandurang Patil, is the person who had reached the location, probably, immediately after the incident.

. There is evidence of as many as three medical officers on record. PW 8 Dr. Ganesh Prabhakar Dhavalshank is Autopsy Surgeon, and post-mortem notes of his observations are at Exhibit - 39. He has

recorded cause of the death to be fracture of left parietal lobe, with underlying haematoma. PW 9 Dr. Jyoti had clinically examined the complainant Vimal and her mother Draupadibai. She had issued composite certificate (Exhibit -42) about the injuries noticed on their persons. The evidence of Dr.Jyoti and the certificates are now irrelevant for the purpose of present appeal. Dr.Mrunalini (PW 10) had clinically examined accused Nos.2 and 3 Balu and Vijaymala. She noticed no injuries on the person of Balu and she has certified three abrasion injuries to Vijaymala by certificate (Exhibit- 47).

. PW 1 Harichandra Narayan Khade attended the inquest panchanama (Exhibit-24). PW 2 Ashok Govind Narkar was a panch witness when panchanama of the spot (Exhibit-26) was drawn, and couple of articles were seized from the location, which included pieces of green bangles and denture of victim Baburao. PW 3 Vijay Bajirao Jagdale is the third panch witness to the discovery under Section 27 of the Evidence Act. Memorandum regarding statement by the accused (Exhibit - 28) and panchanama regarding discovery of stick and sickle from the foddar (Exhibit- 29) kept on the loft and in the house of the accused, were witnessed by Vijay (PW 3).

. PW 11 Navanath Kumbhar is Head Constable, attached to Kale Out Post, had reached the location and recorded statement of the complainant Vimal upon telephonic intimation of the incident. We have already referred to PW 12 Vithal, who was API then attached to Panhala Police Station and he has carried out the investigation.

4. So far as the defence of accused is concerned, on reference to his statement under Section 313 of the Code of Criminal Procedure, 1973 (and we are referring to the statement of accused No.1 alone), he has answered all the questions, either with denial or with absence of knowledge. In fact, he did not open his mouth even to the terminal question when he was asked whether he would like to say anything on his own.

5. Heard the learned advocate Shri Uday Warunjikar for the appellant and the learned APP Smt. V.R.Bhonsale for the respondent - State. Shri Warunjikar has taken us through the entire evidence of all the important witnesses as also the judgment of the trial Court. According to him, the trial Court erred in placing implicit reliance upon the evidence of Gayatri (PW- 7) and Vimal (PW 4). He pointed out that there are omissions amounting to

contradictions in the deposition of Gayatri, and so far as Vimal is concerned, he pleaded her to be unreliable witness for several reasons, which we shall deal with at length. He was also critical because the prosecution has not examined any independent witness. As the second line of defence, he placed reliance upon the complaint of accused No.3, a copy of which is on record at Exhibit-52. Dr.Mrunalini (PW 10) has also certified the existence of three abrasion injuries to accused Vijaymala at Exhibit -47. By taking into account the two complaints filed by Vimal and accused No.3 Vijaymala, it is not open for either party to dispute that there was some verbal exchange, and after heated exchange, there was also some scuffle between the two ladies and male family members intervened. By relying upon the facts and circumstances, he tried to fit the case within either first or fourth exceptions to Section 300 of the Indian Penal Code, and urged for conversion of conviction under Section 304 (Pt-II) into lesser offence, in case this Court is not inclined to disbelieve the evidence of complainant Vimal.

. The learned APP urged that Vimal was duly supported by medical evidence. In fact, according to the learned APP, Gayatri is also most natural

witness. She was present in the house, and therefore, she need not be disbelieved merely because of some improvements from the witness box over and above her statement as recorded by the police. In any case, according to the learned APP, the complainant is duly supported by medical evidence, and hence, ought not to be disbelieved. According to the learned APP, the second argument, that the case falls under Section 304 Pt-II, is not sustainable because, there is no evidence to demonstrate grave and sudden provocation or that the act by accused No.1 was without premeditation in a sudden fight, as required by respective exceptions. She urged for leaving the impugned judgment undisturbed.

6. We have already taken an account of the witness examined, we do not think, it is necessary to refer to the evidence of panch witnesses at length including that of discovery evidence. This is because the weapon discovered is a stick, which is available in any house. The stick is not said to have been stained with human blood. In order to determine whether the victim Baburao suffered head injuries at the hand of accused No.1, we are, therefore, required to consider the evidence of PW 4 Vimal (complainant and eye witness), PW 7 Gayatri (complainant's daughter and eye witness), PW 8

Dr.Ganesh (Autopsy Surgeon) and to some extent, PW 6 Narayan Patil, who was resident of vicinity and who reached the location, probably, immediately after the incident.

7. At the outset, we had suggested the learned advocate for the appellant that he may concentrate and demonstrate to us as to why Vimal, who is supported by the medical evidence of Dr.Ganesh and registration of her complaint (Exhibit-33) should be disbelieved. This is because, if the evidence of Vimal is acceptable, that proves the authorship of accused No.1 so far as the injuries suffered by the victim Baburao is concerned, and in that case, the only question to be determined would be whether the death of Baburao which was a result of the injuries suffered amounts to murder or a culpable homicidal, not amounting to murder.

8. So far as the evidence of Gayatri is concerned, we are not inclined to be with the learned APP. We refer to three contradictions, those have occurred during the cross examination of Gayatri. We quote :-

"I have stated before police that I went alongwith my grand mother and grand

father outside the house, but I cannot assign any reason as to why the police have not so mentioned in my statement."

. If this improvement is taken into account, the witness does not seem to have narrated to the police, of having gone outside the house.

"It is not true that, I have not stated before the police that my grand mother was in the house when quarrel was going on in between my mother and Vijaymala. I cannot tell why police have not recorded the same."

"It is not true that I have not stated before police that accused no.1 gave 2-3 stick blows on the head of my grand father. I can't tell the reason why police have not recorded the same."

. There is fourth improvement with which we are not concerned, so far as appeal against the conviction of the appellant/accused No.1 for the offence punishable under Section 302 of the Indian Penal Code, but that throws light upon the character of Gayatri, as witness, and hence, we quote:-

"Balu gave one sickle blow on the hand of my grand mother. It is not true that I have not stated before police that Balu gave sickle blow to my grand mother. I cannot assign any reason as to why police have not recorded the same."

. From the third and fourth contradictions, it is evident that Gayatri is not reasonably aware about the violence and more particularly the number of blows. She is not aware of presence of PW 6 Narayan Patil, may be immediately after the incident. In fact, Narayan had played quite an active role. He had spoken to the daughter of the victim i.e. Vimal, and the two had tried to offer water to the victim. Gayatri has admitted that she had not seen Narayan Patil on that day.

. Because of all these improvements, we find it unsafe to place reliance on the evidence of Gayatri and that is why, by our initial hint to the learned advocate for the appellant, we had suggested him to concentrate about the evidence of Vimal (PW 4).

9. The learned advocate tried to assail

credibility of Vimal by referring to the entire history of Vimal's life. It cannot be denied that Vimal must be suffering from heart burning because her family life is totally ruined. She is left with her daughter to the care of her parents. The husband is residing in the same locality, having married second time, and having begotten children out of second wedlock. Vimal also admitted that she has not filed any proceeding for maintenance, prosecution for bigamy against the husband. Merely because she has admitted in the cross-examination that there can be occasions when she visits Taluka place, we are not inclined to stretch this stray admission, as desired by the learned advocate for the appellant, that she might be litigating other matters. On the contrary, she has admitted that because of financial position of the parents, she has not been in a position to approach a court of law. We are not inclined to look to Vimal, as unreliable witness because of this background.

. The learned advocate for the appellant compared the chief-examination and cross-examination from the deposition of Vimal and also the contents from the complaint (Exhibit-33). According to the learned advocate, Vimal has demonstrated herself to be a shrewd witness and she has improved her version

with every possible opportunity. Certainly, by deposing about the incident, Vimal had deposed that accused No.1 dealt a stick blow on the head of her father. In the same breadth, she added that he gave 2-3 blows of stick. This portion was compared by learned advocate for the appellant to the portion of her cross-examination (Paragraph 8). Here Vimal deposed:-

"Accused no.1 gave 2-3 stick blows to my father while saying so. My father did not try to go away from the spot. My father was in bending position when accused No.1 assaulted him. My father fell down on the ground after receiving 2-3 blows of sticks in the court yard near me."

. The learned advocate Shri Warunjikar has blamed Vimal as the witness, capable of improving story. We are unable to agree with such submission. This version in the cross-examination, which the learned Advocate Shri Warunjikar termed as improvements, are the replies to the questions by defence counsel during the cross-examination, which were put by the defence counsel for testing the truthfulness, veracity and reliability of the

witness Vimal. When this version is matched with the description of injuries which are on the back side of the head (occipital lobe), it must be described that Vimal passed the test successfully.

. No doubt, even in the FIR (Exhibit -33), registered at 18.45 hours, which is within couple of hours from the alleged incident, there is no specific description as to how many number of stick blows were dealt with, at what location and what was posture of the victim when he received the injuries. After all, FIR cannot be encyclopaedic and all said and done in practical life, the witness remains under the control of one authority or the other, the police officer while recording the complaint and the public prosecutor while recording the chief-examination. Merely because better version has come in the cross-examination, we are not prepared to brand Vimal as a liar.

10. On reference to the medical evidence, as rendered by Dr.Ganesh (PW 8), the learned advocate assailed the statement :-

"the death was occurred due to injuries fracture of left parietal lobe, with underlying haematoma, which must have

compressed the Brain matter, must have lead to death."

. According to the learned advocate, Doctor has given final opinion only after the report of pathology of viscera was available, and therefore, Doctor is telling in terms of "must have" and he is not talking that this injury "has resulted" into death. Doctor reserved his opinion till the report of pathology of viscera was available. Viscera is subjected to pathological test in order to rule out the possibility of death by poison. Merely because the Doctor says that fracture of left parietal lobe, with underlying haematoma, must have compressed the brain and resulted into death, we do not feel that there is any uncertainty in the mind of medical officer regarding cause of death, as tried to be submitted by the learned advocate for the appellant.

. It appears that the defence counsel before the trial Court had tried to develop a defence that the death was by heart failure. Having gone through the post-mortem notes (Exhibit-39) and even column No.20 pertaining to thorax, and more particularly column G pertaining to heart, although, two white patches are reported on interior wall of heart, that is hardly sufficient to draw an inference that it

was a death by heart-attack. On the contrary, on the description of surface injuries, which the medical officer has done by drawing a sketch, it is evident that three contusions are on the occipital region and within a short distance from each other. In the opinion of the medical officer, these injuries are caused by hard and blunt object, like stick before the Court. We must say that the medical evidence perfectly matches the oral evidence of Vimal.

. The evidence of Vimal should be considered credit-worthy, in view of the fact that the incident has occurred at about 4.30 p.m. and the FIR is registered at about 6.45 p.m. Thus, there does not appear any delay or time consumed for premeditation and adding embellishment.

. We may refer to cross-examination (paragraph 7) of Vimal as illustration of Vimal being a fair witness. Vimal does not dispute that since she formed an impression that accused No.3 was abusing her, she challenged the accused No.3, whereupon, accused No.3 told her that accused No.3 was abusing her own children, and not the complainant Vimal. Taking an overall view of the evidence of Vimal, in the light of the FIR (Exhibit-33), we are unable to

agree with the submission of the learned advocate
for the appellant that Vimal is unreliable witness.

11. Once we show our inclination to accept the evidence of Vimal, duly supported by the medical evidence and her complaint, we are required to consider the second submission of the learned advocate for the appellant. On reference to Exhibit-52, it is evident that accused No.3 Vijaymala had also lodged a complaint. This was registered on 10th September, 2000 at 11.15 hours i.e. next morning. The prosecution has brought on record at Exhibit-47 the certificate regarding injuries suffered by accused No.3 Vijaymala. The certificate shows that Vijaymala had suffered three abrasion injuries, one over occipital region, second over left eye and third over left elbow. Since it is the story of both the ladies, i.e. the complainant Vimal and the accused No.3 Vijaymala, that they had exchange on the point of abusing and they had entered a scuffle, these injuries automatically stand explained. It is nobody's case that Vijaymala was assaulted by any other person from the prosecution side, except the complainant Vimal. According to the learned advocate for the appellant, the victim was father of Vimal. Accused No.1 is husband of the other party Vijaymala

involved in the scuffle. When the two female members were involved in the scuffle and accused No.1 could see the deceased Baburao intervening, a possibility cannot be ruled out that the accused must have believed that Baburao would assist his daughter and thus, his wife was in danger. Shri Warunjikar, the learned advocate for the appellant, therefore, tried to argue that the case of the accused No.1 would fall within the first exception to Section 300, if not, in the fourth exception.

The first exception to Section 300 of the Indian

Penal Code reads thus:-

"Exception 1.- When culpable homicide is not murder. - Culpable homicide is not murder if the offender, whilst deprived of the power of self-control by grave and sudden provocation, causes the death of the person who gave the provocation or causes the death of any other person by mistake or accident."

. By taking into consideration the factual details, if the two females were quarrelling and had indulged into physical violence, and if the victim Baburao had intervened, it is nobody's case that Baburao was armed with any weapon, it is not suggested to Vimal that Baburao acted in such a

manner as to be helpful only to Vimal or that action of Baburao was such that somebody could have believed the same to be molestation of Vijaymala. We are, therefore, unable to accept the submission that accused No.1 acted as a result of grave and sudden provocation, and whilst he was deprived of the power of self control. As can be seen from the post-mortem report, Baburao was aged about 59 years and very close to be a senior citizen. Accused No.1 - appellant is still in his 30's, and ordinarily, he ought to have believed that old man was trying to intervene and stop the quarrel. We do not feel that there was any grave and sudden provocation to accused No.1.

12. The fourth exception to Section 300 reads thus:-

"Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender's having taken undue advantage or acted in a cruel or unusual manner."

. Upon considering the ingredients of Exception No.4 and applying those to the facts of

the case at hands, we feel that the defence suffers on two counts. The action of accused No.1 strictly cannot be said to be without premeditation. It is the case of the prosecution that he ran inside the house, came out with a stick and dealt three stick blows on the occipital region of the victim Baburao, while Baburao was in a bent posture over the quarrelling ladies. Accused No.1 also cannot be said to have not acted in a cruel manner, or not to have taken undue advantage. The victim Baburao was unarmed, accused No.1 was armed with stick, location on the body of the victim chosen was fatal location, if the stick is taken into account as a weapon. If the victim was in a bent posture, one can imagine that the softest and highest surface of the human body, i.e. buttock, was exposed and if accused No.1 had acted only to defend his wife, he could have stopped the old man, by using that surface for landing his blows.

13. Shri Warunjikar, the learned advocate for the appellant, has placed reliance upon the reported judgments.

. The Apex Court in the matter of Surinder Kumar v. Union Territory, Chandigarh, reported in (1989) 2 SCC 217, in its paragraph 7, lays down the

tests which are required to be satisfied, by the defence in order to bring its case within the fourth exception to Section 300 of the Indian Penal Code. That the assailants should not take undue advantage is one of the requirements and we have demonstrated that in the matter at hands, the accused has done so.

. Kikar Singh v. State of Rajasthan, reported in (1993) 4 SCC 238 was also relied upon and more particularly, the observations in paragraphs 8 and 9. In paragraph 8 itself, it is observed by the Apex Court that, if two men start fighting and one of them is unarmed while the other uses a deadly weapon, the one who uses such weapon must be held to have taken an undue advantage. In the matter at hands, the victim was unarmed whereas, the accused procured the stick from the house and then assaulted the victim, who was in a bent posture.

. We are, therefore, unable to agree with the learned advocate for the appellant that the act of the accused can be considered to be an offence of less severe nature, such as one, under Section 304 (II) of the Indian Penal Code, and therefore, for leniency by lesser sentence.

14. For the reasons discussed above, the appeal fails and the same is dismissed.

. The Registrar (Judicial) shall ensure supply of a certified copy of this judgment, free of costs; to the appellant through prison authorities.

(V.K.TAHILRAMANI,J)

(N.V.DABHOLKAR,J)